1. **1511606 (Migration) [2016] AATA 3723 (8 April 2016)**

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Gurjit Singh
CASE NUMBER:	1511606
DIBP REFERENCE(S):	BCC2009/304449
MEMBER:	Alan Duri
DATE:	8 April 2016
PLACE OF DECISION:	Sydney
DECISION:	The tribunal affirms the decision not to grant the applicant a Skilled (Provisional) (Class VC) visa.

Statement made on 08 April 2016 at 7:50am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 July 2012 to refuse to grant Mr Singh a Skilled (Provisional) (Class VC) visa under s.65 of the *Migration Act 1958* (the Act).

7. Mr Singh was born in India in 1985 and first came to Australia on a student visa in 2007. He applied for the skilled visa on 20 August 2009. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.485.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied that Mr Singh met public interest criterion 4020. The delegate found that Mr Singh had a bogus document in connection with his visa application in relation to his visa application. In particular the delegate found that the documentation Mr Singh had provided concerning his work experience was fraudulent.

8. On 28 August 2013 the Migration Review Tribunal affirmed the department's' decision.

9. On 22 July 2015 the Federal Circuit Court of Australia quashed the MRT decision and ordered a writ of mandamus directing the AAT to re-determine the matter according to law.

10. **Hearing**

11. Mr Singh appeared before the tribunal on 18 March 2016.

12. Mr Singh told the tribunal that when he came to Australia he studied hospitality and commercial cookery at the Homes Institute from 2007 until 2009. He stated he achieved a Certificate IV in commercial cookery. At the time he was living rent-free with friends in Blacktown and he was supported by money from his family in India.

13. Mr Singh told the tribunal that he found out through a friend about the restaurant Copper Tiffen. He recalled that he started unpaid work at the restaurant from about December 2007 and finished around October 2008. He usually attended the restaurant three days per week, usually Monday, Tuesday and Thursday, and he worked usually from 4 PM to 9 PM. He indicated that he worked throughout the whole period except he may have taken two weeks off. Mr Singh told the tribunal that he helped prepare food, sometimes cooked, washed dishes and cleaned the floor. Mr Singh also stated that he used to make curries and peel potatoes. The tribunal noted the work reference indicating that Mr Singh also used the Tandoor oven. Mr Singh stated that he was trained how to use the Tandoor oven. He indicated he is now proficient in Tandoori cooking.. Mr Singh denied ever receiving remuneration for his duties and he stated that he worked there because he wanted to get the experience. Mr Singh referred to his evidence at the previous tribunal hearing and he indicated that he had underestimated the amount time he spent training and performing cooking tasks.

14. The tribunal asked Mr Singh about his current circumstances. He stated that he opened a restaurant in Lithgow on 1 February 2016. It is called Coffee Thyme Indian restaurant. The business is actually in a friend's name but he put $17,000 into the business. The partner who is employed as a truck driver is a permanent resident and he has put money into the business. The restaurant has about 60 to 70 seats and employees a manager/waiter who is on a Subclass 457 visa. When the restaurant is busy they also employ a local girl as a part-time waitress. Mr Singh's role in the business is as chef. Mr Singh is single and was unable

to identify any other Australian citizens/permanent residents or eligible New Zealanders whose interests may be affected by this decision.

15. Comments/response to information

16. On 24 March 2016 the tribunal wrote to Mr Singh under s.359A and s.359 of the Act, inviting him to comment on or respond to information and to provide information.

17. On 6 April 2016 the tribunal received a response by way of a latter from Gurpreet Singh Saini concerning Mr Singh's current employment. Mr Singh did not comment on or respond to the particular adverse information in the s.359A letter.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The question before the tribunal is whether Mr Singh meets public interest criterion 4020 as required by cl.485.224 for the grant of the visa. Broadly speaking, this requires that:

- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

19. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). Public interest criterion is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

20. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.

21. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or

information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

22. While public interest criterion 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for public interest criterion 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

23. The document in question is an undated letter from Yassh Desai the Director of an Indian restaurant called Copper Tiffin. The letter states that Mr Singh was employed as a cook on a voluntary basis from December 2007 to October 2008. This letter was given to Trades Recognition Australia for the purposes of assessing Mr Singh's skills for his nominated position as a cook.

24. The tribunal finds that the information contained in that that letter is false and misleading because:

- Mr Singh gave evidence at a hearing on 24 July 2013 before the then Migration Review Tribunal. According to the decision record Mr Singh was reported to have given the following evidence to the Member about your duties at Copper Tiffen Restaurant:

> *25. "As to his duties, he said he did also dishes with another person. He would sometimes clean the oven and the kitchen floor at the end of the evening. Sometimes he would help the chef with the vegetables – washing and slicing onions, washing and peeling potatoes, washing and cutting tomatoes. About 80% of his work was washing up, though, and the balance – helping the chef – is because of his interest in cooking."*

- The department's records indicate that 56 applicants have claimed to have completed their work experience at Copper Tiffin over the same period of time that you were reported to have completed your work experience.

26. The tribunal acknowledges that Mr Singh now claims that during the 24 July 2103 hearing he had underestimated the amount of time he had spent cooking. However the tribunal is not prepared to accept Mr Singh's recent evidence at face value because his evidence has changed following his previous hearing.

27. Nevertheless the tribunal is prepared to accept that Mr Singh did unpaid work at Copper Tiffin. However the combined effect of the above information is that the tribunal does not accept Mr Singh's evidence that he was employed as a cook as claimed, but rather as a kitchen hand. Furthermore, regardless of the nature of his employment, the tribunal does not accept Mr Singh's suggestion that he worked 900 hours Copper Tiffin. This is because 56 other people were reported also to have been working at Copper Tiffin during the same period.

28. The tribunal finds the work reference from Copper Tiffin contains information that was false and misleading. This in turn leads the tribunal to find that Mr Singh has given, or cause to be given information a relevant assessing authority that is false or misleading in a material particular in relation to the application for the visa.

29. Therefore, Mr Singh does not meet cl.4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) BE WAIVED?

30. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.

31. For the following reasons, the tribunal is not satisfied that the requirements should be waived.

32. There has been no claim and there is no evidence before the tribunal that there are compelling circumstances that affect the interests of Australia.

33. During the hearing, Mr Singh gave evidence that he and an associate opened a restaurant in Lithgow in February 2016. He indicated that he is a part financial owner of the business and that his business associate is a silent partner who is employed as a truck driver. Mr Singh did not identify any permanent employees of the business who are Australian citizens or permanent residents. A manager/waiter was reported to be holding a Subclass 457 and the business occasionally employs "a local" to work casually when they are busy.

34. Following the hearing, the tribunal received a letter dated 5 April 2016 from Mr Saini, the director of Coffee Thyme Indian Restaurant. The letter provided:

> *35. "Mr Gurjit Singh is our nominee. Upon his commencement of work he provided vital skills that were instrumental to the businesses operation and success. Due to the unavailability of locating such skills from the local labour market he was appointed our nominee.*
>
> *36. "Having invested a substantial benefit from his employment, a benefit which included the employment of Australian citizens in other restaurant functions such as food, service and kitchen hands, and further economic activity generated within our community……..*
>
> *37. "It is my feeling that the unfortunate reality of this current situation, is that a business will directly affected. In the absence of Mr Gurjit Singh and decreasing trading hours, due to the absence of a full-time cook and also a decline in Management standards due to my attention being required in the kitchen operations….."*

38. Mr Saini's letter is remarkably different to the evidence Mr Singh gave at the hearing. Mr Singh gave clear and unambiguous evidence that he is a part owner of the business and that he invested $17,000 in the business. On the other hand Mr Saini suggests that Mr Singh is merely an employee or a "nominee". Mr Singh clearly indicated that the part owner of the business had no hands-on involvement and was employed as a truck driver.

39. While the tribunal is prepared to accept that Mr Singh has recently opened a business, the tribunal does not accept that there are compelling or compassionate circumstances affecting the interests of an Australian citizen/permanent resident or eligible New Zealand citizen. The worst-case scenario is that the Coffee Thyme Indian Restaurant would close down. Even then this is speculative and is based on assumptions that the business would not be able to find a chef capable of cooking Indian food. Regardless, even accepting that the restaurant may shutdown, the only Australian citizens/permanent residents or eligible New Zealand citizens that would be directly affected would be Mr Singh's business partner Mr Desai and the presumably Australian local who occasionally works part-time at the restaurant. The part

owner is a silent partner who works as a truck driver. The “local” only works at the restaurant casually. Given the restaurant has been operating for only a few months and given the limited number of Australians that may be affected and only then to a limited degree, the tribunal is not prepared to accept that any impact on the business constitutes compelling or compassionate circumstances affecting the interests of an Australian citizen, Australian permanent resident or eligible New Zealand citizen.

40. Mr Singh is single. He has not identified any other Australian citizens/permanent residents or eligible New Zealand citizens whose interests would be affected.

41. Therefore the requirements of cl.4020(1) should not be waived.

42. On the basis of the above, Mr Singh does not satisfy public interest criterion 4020 for the purposes of cl.485.224.

43. There is no evidence or suggestion that Mr Singh meets the relevant criteria for any other subclass within the class of visa sought.

DECISION

44. The tribunal affirms the decision not to grant the applicant a Skilled (Provisional) (Class VC) visa.

Alan Duri
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is ***false or misleading in a material particular*** means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

…